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IN THE

# Supreme Court of the United States

NOVEMBER TERM, 1952.

No. 456

WILLIAM P. MCNISH, *Petitioner, Appellant,*

vs.

THE AMERICAN BRASS COMPANY and the ANSONIA BRASS WORKERS' UNION LOCAL No. 445 P.M.C. of the INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, C.I.O., *Respondents, Appellees.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

WILLIAM P. MCNISH, Petitioner,
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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner in the above entitled cause respectfully represents that he has been aggrieved by a decision of the Supreme Court of Errors, the highest court of the State of Connecticut.

## I. TIMELINESS OF PETITION

1. The opinion sought to be reviewed by certiorari was rendered by said court upon June 3, 1952,

Rec. Pgs. 43 to 50, and a Motion to Reargue, Rec. Pgs. 52 to 59, was dismissed upon June 24, 1952 without opinion. Rec. Pg. 59.

2. The petitioner duly obtained an order for extension of time to file certiorari until October 22, 1952, Rec. Pg. 62, and thereafter a further extension until November 20, 1952, Rec. Pg. 63, and has filed this petition within the period therein provided.

## II. OPINIONS BELOW

The opinion of the Superior Court of Fairfield County, Rec. Pgs. 33, 34, is not reported. The opinion of the Supreme Court of Errors of the State of Connecticut, Rec. Pgs. 43 to 50, is reported in 139 Conn. 44.

## III. JURISDICTION OF THIS COURT

The respondents claim that the causes of action for breach of contract and in tort for conspiracy set forth by the petitioner in the complaint, Rec. Pgs. 2 to 14, constitute "unfair labor practices" as defined by the National Labor Relations Act, 61 U.S. Stat. 146, enacted June 23, 1947, and that the respondents had the "right, privilege or immunity" to have any complaint in connection with these matters determined by the National Labor Relations Board under Sec. 10 (a) of the Act. The petitioner disputed this claim made by the respondents and instead asserted that the state court had jurisdiction and was not divested of that jurisdiction over these causes of action for breach of contract and in tort for conspiracy by any provision of the National

Labor Relations Act even if these causes of action constituted "unfair labor practices" as defined by the Act. Rec. Pgs. 31, 32.

The state court decided this question of the "title, right and privilege or immunity" claimed or set up under the Act by the respondents adversely to the petitioner. The entire matter therefore becomes one of the determination of the proper forum under the "right, title, privilege or immunity" set up or claimed under the federal statutes. The United States Supreme Court, therefore, has a right to review this decision of the state court by certiorari because a "title, right, privilege or immunity" specially set up or claimed under the statutes of the United States is involved, in accordance with c. 646, 62 U.S. Stat. 929, enacted June 25, 1948; U.S.C.A., Title 28, #1257, Pg. 88.

## IV. LEGAL ISSUE PRESENTED FOR REVIEW

Whether the National Labor Relations Act divests the state court of jurisdiction of causes of action of an individual employee for damages for loss of wages for breach of a collective bargaining contract or in tort for conspiracy to breach such a contract and vests exclusive jurisdiction in the National Labor Relations Board,

(a) Where these causes of action do not constitute "unfair labor practices" as defined by the Act;

(b) Where these causes of action do constitute "unfair labor practices" as defined by the Act.

## V. FEDERAL STATUTES INVOLVED

The interpretation of Sec. 7, Sec. 8 (a) (1), (2), (3), Sec. 8 (b) (1), (2), and Sec. 10 (a) of the National Labor Relations Act (i.e. Taft-Hartley Act), 61 U.S. Stat. 146, enacted June 23, 1947, are involved in this action.

The provisions of these sections, insofar as pertinent hereto, are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or dis-

courage membership in any labor organization; . . ."

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

"Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; . . ."

## VI. NATURE OF THE CASE

1. The petitioner was employed for the past eight years or more by the respondent, employer, up to December 3, 1948, when he was "laid off" from work. Complaint, Pars. 1 to 18, Rec. Pgs. 1 to 6.

2. Up to and including said date of December 3, 1948 and for sometime prior thereto the respondent,

employer, had a collective bargaining contract with the respondent, union, under the terms of which contract the petitioner, as an employee, was entitled to certain seniority rights providing for re-employment after a "lay off" from work according to certain seniority rules therein prescribed. Article VI, Seniority Prov., Rec. Pgs. 9 to 13; Complaint, Pars. 1 to 18, Rec. Pgs. 1 to 6.

3. The employer, after said "lay off", re-employed many others but refused to re-employ the petitioner despite the fact that he was entitled to be re-employed under the Seniority Provisions, Art. VI, Rec. Pgs. 9, 10, of this collective bargaining contract; Complaint, Pars. 1 to 18, Rec. Pgs. 1 to 6, resulting in loss of wages to the petitioner.

4. The refusal of the employer to re-employ the petitioner was a violation of the seniority provisions of the collective bargaining contract which required his re-employment under the circumstances. Complaint, Par. 12, Rec. Pg. 5.

5. The refusal of the employer to re-employ the petitioner was caused by the union as a result of a conspiracy between the employer and the union. Complaint, Par. 24, Rec. Pg. 7.

6. The petitioner thereafter instituted suit for damages in the Superior Court of the State of Connecticut by writ and complaint dated May 3, 1950 and alleged:—

(a) **As a first cause of action:** That the employer was severally liable upon the basis of the common law cause of action of breach of contract, for the loss of wages suffered by reason of its violation of the terms of the col-

lective bargaining contract. Complaint, First Count, Rec. Pgs. 1 to 6.

(b) **As a second cause of action:** That the employer was severally liable upon the basis set forth in the First Count, Complaint, Second Count, Pars. 1 to 18, Rec. Pgs. 1 to 6; and further that the employer and the union were both severally and jointly liable upon the basis of the common law cause of action in tort for conspiracy, for the loss of wages suffered by the petitioner as a result of the employer's failure to perform the terms of the collective bargaining contract pursuant to a conspiracy between the employer and the union to prevent the petitioner's re-employment. Complaint, Second Count, Pars. 18 to 28, Rec. Pgs. 6 to 9.

## VII. FEDERAL QUESTIONS RAISED IN THE PLEADINGS AND DECIDED ADVERSELY TO THE PETITIONER

1. The employer and the union filed Special Defenses, Rec. Pgs. 15 to 23; 25 to 27, to the petitioner's complaint and alleged in said Special Defenses that:—

(a) The causes of action complained of constituted "unfair labor practices" as defined by the National Labor Relations Act.

(b) The state court had no jurisdiction over the causes of action inasmuch as the exclusive jurisdiction over "unfair labor practices" was vested in the National Labor Relations Board under the Act.

(c) The causes of action set forth in the complaint constituted "unfair labor practices" under the Act so that the petitioner was not entitled to maintain the action inasmuch as he had not exhausted his remedies before the National Labor Relations Board, that is, by appealing to the Board's counsel from the refusal of the Regional Director to issue a complaint against the employer and the union as provided by the Act; and that instead, the petitioner had merely filed an "unfair labor practice" charge against the respondents requesting the issuance of a complaint which the Regional Director had dismissed by letter, without a hearing; and the petitioner had failed to take any appeal from this action of the Regional Director to the Board's counsel as provided by the Act.

2. The petitioner raised the question of the "title, right, privilege or immunity" specially set up or claimed by the respondents under the National Labor Relations Act by way of demurrer in which he challenged the legal sufficiency of the allegation of the employer's and union's Special Defenses. Rec. Pgs. 27 to 33.

3. The trial court overruled the petitioner's demurrer and sustained the legal sufficiency of respondents' Special Defenses, Rec. Pgs. 33 & 34, and the petitioner appealed from the trial court's decision to the highest state court, that is, the Supreme Court of Errors of the State of Connecticut. Rec. Pgs. 39, 40.

4. The Supreme Court of Errors of the State up-

held the determination of the trial court and the petitioner's complaint was dismissed upon the grounds set forth in Paragraph 1 herein, McNish vs. American Brass Co. et als, 139 Conn. 44 ff, from which decision the petitioner seeks a writ of certiorari.

## VIII. STATE COURT'S INCORRECT INTERPRETATION OF SUBSTANTIAL FEDERAL QUESTIONS INVOLVED AS REQUIRING GRANT OF WRIT OF CERTIORARI

The federal questions involved in the present action before the state court arise out of the interpretation by the state court of the provisions of the federal statutes commonly known as the National Labor Relations Act or the Taft-Hartley Act.

The issues involved are substantial. They are of national importance. The federal questions involved have been raised in numerous actions before various state and lower federal courts. They will undoubtedly be raised with even more frequency before these tribunals as these questions have never been heretofore determined by the United States Supreme Court.

The present decision of the state court of the State of Connecticut is not in accordance with the reasoning of the United States Supreme Court in analogous cases. Nor is the decision of the state court upon these issues in accordance with the decisions of the lower federal courts or the other state courts. A decision by the United States Supreme Court upon these issues is therefore essential to the welfare of

each and every employee, employer or union who may be involved in a similar case.

## IX. ARGUMENT AS TO LEGAL ISSUE

### A. The Causes of Action for Breach of Contract or Tort do not Constitute "Unfair Labor Practices" as Defined by the National Labor Relations Act of which the N. L. R. B'd has Exclusive Jurisdiction.

There can be no question, under the decisions hereafter cited, that the state court had jurisdiction over the causes of action for damages by an individual employee for breach of contract or tort, as set forth in the petitioner's complaint, if these causes of action do not constitute "unfair labor practices" as defined by the Act. An analysis of these judicial authorities discloses that the state court erred in holding that the causes of action, as set forth in the petitioner's complaint, constituted "unfair labor practices" as defined by the Act.

#### (1) STATE COURT'S INCORRECT INTERPRETATION OF AN "UNFAIR LABOR PRACTICE" UNDER THE ACT.

The state court, in effect, determined that discrimination "per se" by an employer under Sec. 8 (a) (3) of the Act or by a union under Sec. 8 (b) (2) and (3) of the Act which resulted in an employee's unemployment, constitutes an "unfair labor practice" under the Act. Rec. Pg. 49. The state court in so doing misinterpreted the federal statutes. The state court's interpretation was also contrary to the decisions of the federal courts.

The decisions of the federal courts hold that discrimination by an employer under Sec. 8 (a) (3) of the Act or by a union under Sec. 8 (b) (2) and (3) of the Act does not constitute an "unfair labor practice" unless its purpose, as expressly defined in the Act, was "to encourage or discourage membership in a labor organization." Not even the vestige of such a claim that this was the purpose of the employer or the union was made by the parties in our case. Complaint, Rec. Pgs. 6 to 8; Respondent's Special Defenses, Rec. Pgs. 14 to 27. The state court erred, therefore, in holding that the actions of the employer and the union, as described in the complaint, constituted an "unfair labor practice" within the definition set forth in the Act. The decision of the state court must, therefore, be reversed by this court just as a similar decision of the district court was reversed by the United States Circuit Court of Appeals.

**Natl. Lab. Rel. Bd. v. Potloch Forest, Inc.,** (1951) (C.C.A.) 189 Fedl. (2d) 82, 84.

Our United States Supreme Court, in an analogous situation under the Railway Labor Act, held that the federal court had jurisdiction of a matter involving racial discrimination as against the Railway Board upon the grounds that the jurisdiction of the Board was confined to those acts specifically designated as discriminatory under that Act and that the type of discrimination involved in the case was not such as designated under the Act, over which the Board had exclusive jurisdiction.

**Brotherhood of R.R. Trainmen v. Howard,** (1952) 343 U.S. 768.

(2) STATE COURT'S RULING AS NOT SUBSTANTIATED BY ITS AUTHORITIES CITED.

The citations referred to by the state court in ruling that the discrimination involved in this action "constituted an unfair labor practice" as defined by the Act of which the Board rather than the state court had jurisdiction, Rec. Pg. 49, do not sustain the holding of the state court.

The first case cited by the state court, **National Labor Relations Bd. vs. Am. Car & Foundry,** 161 Fedl. (2d) 501, Rec. Pg. 49, merely discusses the interpretation of what the word "encourage" means so as to constitute "discrimination" under the Act. That case not only does not support the state court's position but actually holds to the contrary and supports the petitioner's contention. The other cases cited, Rec. Pg. 49, are merely actions in which the courts reviewed decisions of the National Labor Relations Board to determine whether findings as to "unfair labor practices" were supported by the evidence. However, none of these other cases cited by the state court involve the vital question with which we are concerned, that is, whether the discrimination charged was "to encourage or discourage membership" as provided by the Act so as to constitute "an unfair labor practice" as defined by the Act. The decisions of the federal courts which the petitioner previously cited and which involve that exact issue are diametrically opposed to the ruling of the state court.

B. Even if the Causes of Action for Breach of Contract or Tort do Constitute "Unfair Labor Practices" as Defined by the Act, the State Court is

**not Divested of Jurisdiction over these Causes of Action nor is Exclusive Jurisdiction Thereof Vested in the NLRB Under the Act.**

There can equally be no question, as set forth in the citations to the judicial authorities hereafter made, that the state court had jurisdiction over these causes of action for damages by an individual employee for breach of contract or for tort, as set forth in the petitioner's complaint, even if these causes of action constituted "unfair labor practices" as defined by the Act. The error of the state court lay in overlooking the fact that the present action involves a suit for damages and that those cases where the court states "the jurisdiction of the National Labor Relations Board is exclusive" are not suits to collect damages but merely actions where the parties seek to enforce the provisions of the Act. An analysis of these judicial authorities discloses that the state court erred in holding to the contrary.

(1) STATE COURT'S INCORRECT INTERPRETATION OF EXCLUSIVE JURISDICTION OF THE NLRB UNDER THE ACT.

The state court ruled that the actions set forth in the complaint constituted "unfair labor practices" as defined by the Act and that the petitioner's remedy was before the National Labor Relations Board, Rec. Pg. 49. The state court, upon this basis, decided that it had no jurisdiction to entertain the action because exclusive jurisdiction thereof was vested by the Act in the National Labor Relations Board, Rec. Pg. 50. The state court in so doing misinterpreted the federal statutes. Its interpretation was also contrary to

the decisions of the lower federal courts and the state courts involving the exact issues and in addition was contrary to the reasoning of the United States Supreme Court in analogous cases.

The overwhelming weight of judicial authority holds that Congress under the National Labor Relations Act has not preempted the entire field of labor law. There can be no question that these authorities hold that the Act does not divest the state court of jurisdiction over a suit for damages based upon a common law cause of action. There can be equally no question that exclusive jurisdiction over such a cause of action is not vested in the Board even if that cause of action constitutes an "unfair labor practice" under the Act. The present decision of the state court was contrary to the holding of the authorities in cases involving not only similar but also the exact issues that are involved in our case. The following are typical and illustrate the petitioner's contention:

(a) Congressional intent to allow the enforcement of collective bargaining contract to be left to the usual process of the law and not to the National Labor Relations Board.

Citations to hearings of committees in Congressional Reports,

Teller, Labor Disputes, Vol. 2, Supp. (1950), #398.162, Pg. 174.

(b) State court cases establishing jurisdiction of state courts as against National Labor Relations Board over actions for damages for loss of wages involving breach of contract or tort which also constitute "unfair labor practices" under the National Labor Relations Act.

**Basile vs. Fisher,** (N.Y.) (1949) (tort action), 197 Misc. 493, 496;

**Reichert vs. Quindazzi,** (N.Y.) (1938) (breach of contract), 6 N.Y.S. (2d) 284, 286;

**Goerner vs. Lippe,** (N.Y.) (1941) (breach of contract), 3 Labor Cases, #60285, Pg. 60866.

(c) Federal court cases establishing jurisdiction of state court as against National Labor Relations Board to enact and enforce legislation relating to "unfair labor practices" where they are not designated as "unfair labor practices" under the National Labor Relations Act.

**Algona Plywood & Veneer vs. Wis. Emp. Bd.,** (1948), 336 U.S. 301, 313;

**Allen Bradley Local vs. N.L.R.B.,** (1942), 315 U.S. 740, 748;

**MacKay vs. Loews, Inc.,** (1950), 182 Fedl. (2d) 170, 172;

**Studio Carpenters Local vs. Loews, Inc.,** (1950), 182 Fedl. (2d) 168, 169;

**Schatte vs. Int'l. Alliance,** (1950), 182 Fedl. (2d) 158, 163, reaffirming 165 Fedl. (2d) 216 (1948), which affirmed 70 Fedl. Supp. 1008, 1011 (1947);

**John Hancock Mut. Life Ins. vs. United O & P Workers,** (1950), 93 Fedl. Supp. 296, 304 ff.;

**United Elec. Wkrs. vs. Westinghouse,** (1946), 65 Fedl. Supp. 420, 422.

(d) Federal court cases establishing jurisdiction of federal courts as against National Labor

Relations Board over actions for loss of wages or over actions involving breach of contract and tort which also constituted "unfair labor practices" under the National Labor Relations Act.

**Textile Wkrs. Union vs. Arista Mills,** (1951), 193 Fedl. (2d) 529, 533;

**Marrazoni vs. Riggs National Bank,** (1950), 184 Fedl. (2d) 349, 350;

**U.A.W. vs. Wilson Athletic Goods,** (1950), U.S. Dist. Ct. (Ill.) CCH-#65867, Pg. 7784;

**Reed vs. Faiwich Airflex,** (1940), 86 Fedl. Supp. 822, 824;

**Wilson & Co. vs. United Pack. House Wkrs.,** (1949), 83 Fedl. Supp. 162, 165;

**Intl. L. S. & W. Union vs. Juneau Spruce,** (1952), 342 U.S. 237, 244.

(e) Federal court cases establishing jurisdiction of state court as against federal court in actions involving contractual rights under the Act, including breach of contract and conspiracy, upon grounds that actions involved interpretation of contract under state law and so no federal question was involved of which the federal court had jurisdiction.

**Schatte vs. Intl. Alliance,** (1950), 182 Fedl. (2d) 158, 163, reaffirming 165 Fedl. (2d) 216 (1948), which affirmed 70 Fedl. Supp. 1008, 1011 (1947);

**MacKay vs. Loews, Inc.,** (1950), 182 Fedl. (2d) 170, 172;

**Studio Carpenters Local vs. Loews, Inc.,** (1950), 182 Fedl. (2d) 168, 169.

(f) State and federal court decisions in analo-

gous cases under the Railway Labor Act, the reasoning of which is applicable to our case, establishing jurisdiction of the state court as against Railway Labor Board over actions involving right to recover for breach of contract or tort upon collective bargaining contracts under that Act.

STATE CASES:

**Dooley vs. Leigh Valley R.R.**, (1941), 130 N.J. Eq. 75, 85;

**Rentschuler vs. Miss. R.R.**, (1934), 95 A.L.R. 1, 7, 126 Neb. 493, 253 N.W. 694;

**Grand Intl. Bro. of Eng. vs. Mills**, (1934), 31 Pac. (2d) 971, 977, 43 Ariz. 379.

FEDERAL CASES:

**Priest vs. Chicago R.I. & P.R.R.**, (1951), 189 Fedl. (2d) 813, 815;

**Slocum vs. Del. L. & W. R.R.**, (1950), 339 U.S. 239, 244;

**Ord. of Ry. Conductors vs. So. Ry.**, (1950), 339 U.S. 253, 256;

**Moore vs. Ill. Cent. R.R.**, (1941), 312 U.S. 630, 634.

(2) STATE COURT'S RULING AS NOT SUBSTANTIATED BY ITS AUTHORITIES CITED.

The state court quoted, Rec. Pg. 48, from **Schatte vs. International Alliance**, 182 Fedl. (2d) 158, in ruling that the state court had no jurisdiction because "the exclusive remedy for the commission of an unfair labor practice was in proceedings before the National Labor Relations Board."

It appears, however, that the circuit court in that case reviewed the decision of the district court, 70 Fedl. Supp. 1008, in which the district court specifically held that an action for declaratory judgment for conspiracy arising out of a collective bargaining contract was one of contractual interpretation which must be determined under state laws by a state court rather than by a federal court under the federal laws and that in any event, at Page 1011, the "suit does not arise under the constitution or laws of the United States, and the Circuit Court lacks jurisdiction" so that the complaint must be dismissed. The circuit court affirmed, and correctly so, this position. This is a far cry from the ruling adopted by the state court upon the basis of that case. The cases quoted in the excerpt from **Schatte vs. International Alliance,** Rec. Pg. 48, are equally inapplicable and fail to sustain the ruling that the state court has no jurisdiction over the causes of action because they constitute "unfair labor practices" as defined by the Act.

These cases wherein the court states "the jurisdiction of the National Labor Relations Board is exclusive" merely involve actions to enforce the provisions of the Act. They do not involve suits for damages for breach of a collective bargaining contract or for tort. Such actions must be brought before a state court.

## X. A DECISION OF THIS COURT UPON THE ISSUES PRESENTED AS MAKING QUESTION OF EXHAUSTION OF REMEDIES IMMATERIAL.

The state court in its decision made reference to

the principles of law concerning the failure of the petitioner to appeal to the Board's counsel from the Regional Director's refusal to issue a complaint and to the principle of law concerning exhaustion of remedies. Upon the basis of the application of these principles, the state court ruled that the petitioner was not entitled to maintain the present action. Rec. Pg. 50.

The only actual question raised in our case as to these facts was as to "res adjudicata," Company's Defense, Rec. Pgs. 15, 16 and Union's, Rec. Pgs. 25, 26. The state court, however, in its decision referred to the issue of "exhaustion of remedies," Rec. Pg. 50. There can be no question that the petitioner's action did not constitute "res adjudicata." **Republic Steel Corp.** (1945), 62 Natl. Lab. Rel. Bd. 1008, 1022; **Gibbs Corp.** (1947), 74 Natl. Lab. Rel. Bd. 1181, 1244; **Natl. Lab. Rel. Bd. vs. Baltimore Trust,** (1944), 140 Fedl. (2d) 51, 54; **Natl. Lab. Rel. Bd. vs. Phillips Gas & Coal,** (1944), 141 Fedl. 304, 306.

Even more important, however, is the fact that the law applicable to the principle of "exhaustion of remedies" becomes merely academic at this stage of the proceedings. The reason for this is that the paramount issue involved is one of jurisdiction. If, therefore, this court should decide that the state court incorrectly ruled that the causes of action set forth in the complaint constituted "unfair labor practices" as defined by the Act, then the state court would naturally have jurisdiction and the question of whether the petitioner appealed or exhausted his administrative remedies would become immaterial; and likewise, if this court should decide that the state court has jurisdiction of these causes of action even

if they did constitute "unfair labor practices" as defined by the Act, the question of whether the petitioner appealed or exhausted his administrative remedies would likewise become immaterial.

It is the petitioner's contention, however, that if this question as to exhaustion of remedies should be deemed material by this court, that the ruling of the state court upon these issues was also erroneous. The fact that the petitioner sought to withdraw his charge against the union and the employer when the Regional Director refused to issue a complaint instead of appealing to counsel for the Board was immaterial as the petitioner was merely pursuing a futile remedy which he abandoned. The reason for this is that the Act fails to provide for any judicial review or for any appeal from the refusal of the Board's counsel to issue a complaint so as to enable the petitioner to secure any hearing upon the charges made. The only judicial review afforded by the Act, the statement of the state court to the contrary not withstanding, Rec. Pg. 50, is an appeal from a final order of the Board under Section 10 (b) of the Act. Any determination not to issue a complaint, as in this instance, by the Board's counsel is final under Section 3 (d) of the Act. **Manhattan Cons. Co. vs. Natl. Lab. Rel. Bd.** (1952), 198 Fedl. (2d) 320; **Gen. Driver, Chauffeurs vs. Natl. Lab. Rel. Bd.**, (1950), 179 Fedl. (2d 492. There likewise can be no question that under the Act, the petitioner under these particular circumstances, was not required to exhaust his administrative remedy, if any, before instituting suit. This has been the interpretation of similar provisions of the Railway Labor Act by our Supreme Court and it is the only possible interpreta-

tion that can be taken by our Supreme Court of the same provisions in the National Labor Relations Act. **Slocum vs. Del. L. & W. R.R.**, (1950), 339 U.S. 239, 244; **Moore vs. Ill. Cent. R.R.**, (1941), 312 U.S. 630, 634.

The cases which the state court cited, Rec. Pg. 50, concerning the necessity of exhaustion of administrative remedies in ruling that the petitioner was not entitled to maintain the present action by reason of his failure to exhaust his remedies under the National Labor Relations Act, Rec. Pg. 50, do not sustain the holding of the state court in this instance. The cases cited are merely general statements of a principle of law which are applicable upon occasion to cases where judicial review is provided. There being none provided by the Act, the principles of law set forth in cases cited, therefore, have no application to our action.

## XI. CONCLUSION

For the reasons foregoing, your petitioner respectfully claims that a writ of certiorari should be issued by the United States Supreme Court to review the rulings of the state court in accordance with the law in such cases made and provided.

Dated at Bridgeport, Connecticut, this 18th day of November, 1952.

The Petitioner,
William P. McNish,
By: David R. Lessler,
His Counsel.

DAVID R. LESSLER, ESQUIRE
945 Main Street
Bridgeport 3, Connecticut

FILED
DEC 19 1952
HAROLD B. WILLEY, Clerk

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IN THE

# Supreme Court of the United States

NOVEMBER TERM, 1952.

No. 456

WILLIAM P. MCNISH, *Petitioner, Appellant,*

vs.

THE AMERICAN BRASS COMPANY and the ANSONIA BRASS WORKERS' UNION LOCAL No. 445 P.M.C. of the INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, C.I.O., *Respondents, Appellees.*

## BRIEF OF THE RESPONDENT, THE AMERICAN BRASS COMPANY, IN OPPOSITION TO PETITIONER'S BRIEF ON HIS PETITION FOR A WRIT OF CERTIORARI

THE AMERICAN BRASS COMPANY, Respondent,
By: WILLIAM J. LARKIN, JR.,
*Its Attorney.*

WILLIAM J. LARKIN, JR., Attorney,
111 West Main Street,
Waterbury, Connecticut.

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IN THE

# Supreme Court of the United States

NOVEMBER TERM, 1952.

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No.

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WILLIAM P. McNISH, *Petitioner, Appellant,*

vs.

THE AMERICAN BRASS COMPANY and the ANSONIA BRASS WORKERS' UNION LOCAL NO. 445 P.M.C. of the INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, C.I.O., *Respondents, Appellees.*

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## BRIEF OF THE RESPONDENT, THE AMERICAN BRASS COMPANY, IN OPPOSITION TO PETITIONER'S BRIEF ON HIS PETITION FOR A WRIT OF CERTIORARI

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## LEGAL ISSUES PRESENTED

The petitioner brought suit against the respondent, The American Brass Company, and the respondent, Union of Marine and Shipbuilding Workers of America, alleging that the respondent, The American Brass Company, breached the Collective Bargaining Agreement between it and the Union in that it had laid off the petitioner out of line of seniority, had failed to transfer him or to re-employ him, and had conspired with the Union to

deprive him of his grievance rights; and that such actions were an unjust discrimination against the petitioner and against his rights of seniority under the "Taft-Hartley Act" and in violation of that Act, and the Collective Bargaining Agreement and seeking damages and equitable relief.

The respondent, The American Brass Company, filed three special defenses to all counts of petitioner's complaint. The second of these special defenses, upon which the Supreme Court of Errors of the State of Connecticut based its decision and which is decisive of the entire issue (as admitted by the petitioner, Petition p. 19) alleged that the matters contained in the petitioner's complaint were within the exclusive jurisdiction of the National Labor Relations Board, as set forth in the Labor-Management Relations Act of 1947.

To this special defense the petitioner filed a general demurrer (R. p. 27) which, in effect, claimed that the special defense of the respondent was not a sufficient defense against either count of the petitioner's complaint (R. p. 50).

By applying the state law of pleading, the Supreme Court of Errors decided that, since the special defense was good as against the petitioner's Second Count, the Demurrer, being general, failed, and that the lower court was correct in overruling the petitioner's demurrer, citing Cashman vs. Meriden Hospital, 117 Conn. 585, 588, 169 A. 915, and cases cited therein.

The ultimate question that will be presented for review should the petition for certiorari be granted by this court, therefore, is:

**Is the special defense of the respondent, which alleges exclusive jurisdiction of the National Labor Relations Board over the matters alleged in the petitioner's complaint, sufficient against the claims set forth in petitioner's Second Count, which alleges conspiracy between the respondents, and discrimination against the petitioner's rights under the Collective Bargaining Agreement between the respondents, and his "rights of seniority as provided by the Taft-Hartley Act."....(R. p. 7, paragraphs 24, 25 and 26)?**

Throughout his brief, the petitioner has set forth the claim that he is entitled to sue in a state court for damages for breach of the Collective Bargaining Agreement between the union and his employer, and that therefore the National Labor Relations Board does not have exclusive jurisdiction of the matters alleged in his complaint.

It is submitted that this issue raised by the petitioner is neither a federal question nor one of substance at this stage. The question of whether the National Labor Relations Board does have exclusive jurisdiction must first be decided before the necessity for determination of an employee's rights to sue upon a Collective Bargaining Agreement arises. And that question will be one governed by the state law of contracts.

Therefore, the answers in opposition to petitioner's request for a writ of certiorari are these:

**1. The Labor-Management Relations Act, the applicable federal decisions and the charges of the petitioner himself leave no doubt that the matters alleged in the petitioner's complaint are charges of unfair labor practices.**

**2. The Labor-Management Relations Act and the applicable federal decisions have already uniformly stated that exclusive jurisdiction over charges of unfair labor practices is in the National Labor Relations Board.**

1. The petitioner, in the Second Count of his complaint, which is directed at both the respondents, has alleged specifically that "The actions of the Defendants aforesaid, were also an unjust discrimination against the Plaintiff and against his rights of seniority, as provided by the Taft-Hartley Act, and in violation thereof" (R. p. 7, paragraph 26).

By his own terminology, the petitioner has characterized his charge as one of an unfair labor practice, for, speaking broadly, there are no rights of action arising to the petitioner under the Act the violations of which are other than unfair labor practices. The petitioner has pin-pointed the violations of which he complains—deprivation of his rights of seniority and disallowance of his grievance. Such violations are declared by the Labor-Management Relations Act to be unfair labor practices (Sections 8 (a) (3, 5) and 8 (b) (2).

The allegations of the petitioner's complaint (R. p. 2, 7) may well be compared with the almost identical unfair labor practice charge filed with the National Labor Relations Board by the petitioner (R. p. 18). In his charge the identical practices of the two respondents are labeled as unfair labor practices. Indeed it may be noted that the petitioner's charge was turned down by the National Labor Relations Board, not on the grounds that the charge was **not** one of an unfair labor practice but that there was no substance to the charge (R. p. 20).

Numerous decisions of this Court, the lower federal courts and the National Labor Relations Board itself have already held that a charge such as that of the petitioner is one of an unfair labor practice. Among the decisions so holding are:

**National Labor Relations Board vs. Link-Belt Co.**, (1940) 311 U.S. 584, 61 S. Ct. 358, 85 L. ed 368;

**National Labor Relations Board vs. Minnesota Mining & Manufacturing Co.**, 179 F. 2d 323;

**National Labor Relations Board vs. Piedmont Cotton Mills**, 179 F. 2d 345;

**Cen-Tennial Cotton Gin Co.**, 90 National Labor Relations Board, 345;

**Kansas-Nebraska Natural Gas Co.**, 90 National Labor Relations Board, 1423;

**John S. Barnes Corp.**, 92 National Labor Relations Board, 589.

The petitioner has attempted in his brief to differentiate his charges from those of charges of unfair labor practices. A reading of the complaint will reveal that his request is basically one for damages and reinstatement under the seniority provisions of the Collective Bargaining Agreement. It is submitted, therefore, that this complaint is essentially one alleging unfair labor practices and that the petitioner's attempted differentiation is unavailing.

Thomas Ryan et al vs. Joseph Simons et al, 302 NY 742 847, 98 NE 2nd 707, 100 NE 2d 44, certiorari denied 96 L ed 140.

Born vs. Cease, 101 F Supp. 473.

Gerry vs. Superior Court (Cal.) 194 P 2d 689

2. The relevant portion of Section 10 (a) of the Labor-Management Relations Act reads as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

Those portions of Section 8 relevant to the charges made by petitioner in his complaint are as follows:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a) [which section gives employees the right to present their grievances.]

"Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ."

As pointed out above, the charges of the petitioner, by their wording themselves and by the nature of the charges, fall uniformly within the quoted portions of Section 8, which sections the Act itself, in section 10 (a), has stated to be within the exclusive province of the National Labor Relations Board.

The reasoning of **Amazon Cotton Mills Co. vs. Textile Workers' Union**, 167 F. 2d 183, has been uniformly followed in holding that the exclusive jurisdiction of charges of unfair labor practices under the Act is in the National Labor Relations Board. In that case it was held that the Federal District Court did not have jurisdiction over an unfair labor practice charge, the Court stating (Parker, C. J.) with relation to the Labor-Management Relations Act that "There is no indication of any intention to change the method by which unfair labor practices were dealt with under the Act or to vest the district courts with jurisdiction as to these matters, except to the limited extent that such jurisdiction was expressly conferred" (P. 186).

Further cases supporting this position are:

**Thomas Ryan et al vs. Joseph Simons et al**, 302 NY 742, 847, 98 NE 2d 707, 100 NE 2d 44, certiorari denied 342 U.S. 897, 72 S. Ct. 231, 96 L. ed 140.

**California Association of Employers vs. Building Construction Trades Council**, 9 Cir. 1949), 178 F 2d 175, 177.

**Schatte vs. International Alliance**, 182 F 2d 158, 166.

**Born vs. Cease**, Supra

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## CONCLUSION

It is submitted, therefore, that because petitioner's charges are clearly those of unfair labor practices and because it has been uniformly held that exclusive jurisdiction over such charges is in the National Labor Relations Board, the petitioner's request for a writ of certiorari should be denied.

The Respondent,
The American Brass Company,
By: William J. Larkin, Jr.
Its Attorney.

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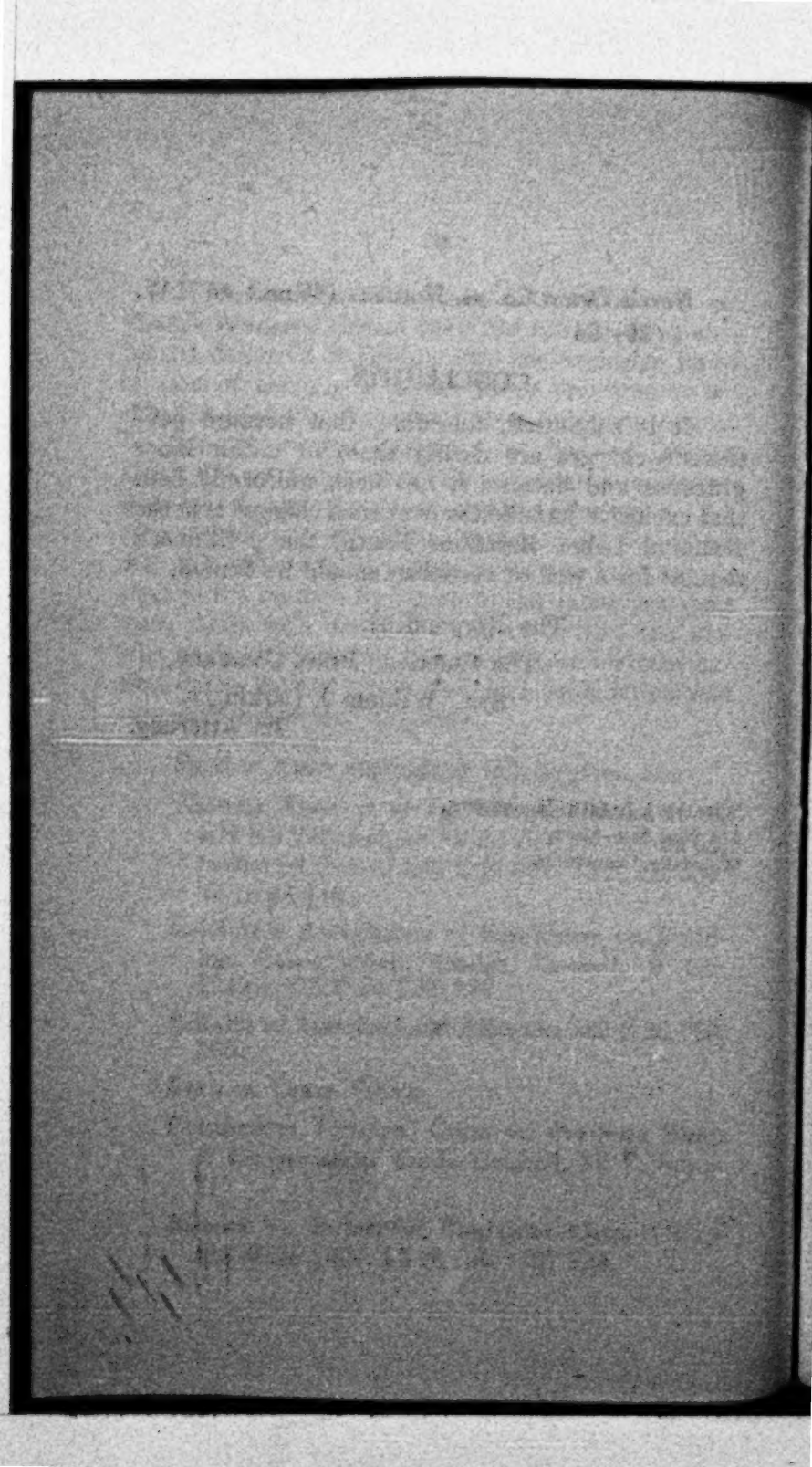

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DEC 19 19

HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

NOVEMBER TERM, 1952.

No. 456

WILLIAM P. MCNISH, *Petitioner, Appellant,*

vs.

THE AMERICAN BRASS COMPANY and the ANSONIA BRASS WORKERS' UNION LOCAL NO. 445, P.M.C. of the INDUSTRIAL UNION OF MARINE & SHIPBUILDING WORKERS OF AMERICA, C.I.O., *Respondents, Appellees.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

ANSONIA BRASS WORKERS UNION
LOCAL 445, P.M.C., IUMSWA,
C.I.O., Respondent, Appellee,

By: MARGARET C. DRISCOLL,
Its Counsel.

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Marsh Press, Inc., Bridgeport, Conn.

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(1) that the petitioner's second count alleged an unfair labor practice and nothing else;

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IN THE

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

---

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondent, Appellee in the above entitled cause, Ansonia Brass Workers Union, Local 445, P.M.C., IUMSWA, C.I.O., respectfully urges that the Petition for a Writ of Certiorari should be denied.

## I. OPINIONS BELOW

The opinion of the Superior Court of Fairfield County, Record pages 33 and 34, is not reported.

The opinion of the Supreme Court of Errors of the State of Connecticut, Record pages 43 to 51, is reported in 139 Connecticut 44.

## II. JURISDICTION OF THE COURT

The Connecticut Supreme Court of Errors held that one count of the petitioner's complaint (the second) charged the commission of unfair labor practices under the Labor Management Relations Act. A general demurrer to a defense that the state court had no jurisdiction over the subject matter of the complaint was therefore overruled because the court held that the subject matter of this second count was exclusively within the primary jurisdiction of the National Labor Relations Board. (Record page 50 and cases cited.)

Under Connecticut law a general demurrer to affirmative defenses against more than one count is properly overruled if any of the defenses are good against any of the counts. (Record page 50.) The petitioner contends that this decision deprives him of a right, privilege or immunity under the Labor Management Relations Act, a statute of the United States.

29 USCA 141 ff.

## III. LEGAL ISSUE PRESENTED FOR REVIEW

The Connecticut Supreme Court decided that the plaintiff's second count could not be construed otherwise than as alleging an unfair labor practice under the Labor Management Relations Act of 1947. It

further decided that the National Labor Relations Board had exclusive primary jurisdiction over such an unfair labor practice and that therefore the state court was deprived of power to pass on this count of the complaint in the first instance. (Record pages 49 and 50.)

The legal issue presented for review is therefore not that stated in the petitioner's petition, page 3. It is rather whether the National Labor Relations Board has exclusive primary jurisdiction to remedy unfair labor practices so that the state courts are without any jurisdiction to act on such matters and whether the Connecticut Supreme Court correctly construed the second count of the petitioner's complaint to allege charges of unfair labor practices under the Labor Management Relations Act.

There is no question before this court of the jurisdiction of the state court over a cause of action of an individual employee for damages for loss of wages for breach of the collective bargaining contract. (Record page 50.) Nor is there any question under the decision of the Connecticut Supreme Court of Errors of the jurisdiction of the state court over any cause of action in tort for conspiracy to breach a collective bargaining contract. (Record pages 48 and 49.)

The Connecticut Supreme Court of Errors in rendering its decision specifically confined itself to a ruling on the question of its jurisdiction over the second count of the plaintiff's complaint which the plaintiff claims set forth a cause of action in tort. It made no decision as to its jurisdiction over the first count of the complaint which the plaintiff claim-

ed alleged a breach of contract. (Record page 50.) In ruling on the cause of action set forth in the second count of the complaint the court specifically held that the count set forth a charge of an unfair labor practice under the Taft-Hartley Act and nothing else, although it stated that the petitioner claimed that the second count stated a cause of action for conspiracy to deprive him of his seniority rights and not for an unfair labor practice. (Record pages 48, 49 and 50.)

It is submitted therefore that the legal issue presented is not that stated in the petition but rather that stated in the second paragraph under this point.

## IV. FEDERAL STATUTES INVOLVED

The federal statute involved is that stated in the petition for the writ of certiorari at page 4, i.e., Labor Management Relations Act 61 U.S. Statute 146, enacted June 23, 1947. The provisions quoted in the petition are all applicable. In addition, however, the following provisions are relevant:

> Section 1 (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided**, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of

this Act or has received a construction inconsistent therewith.

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

## V. NATURE OF THE CASE

The petitioner's statement of the nature of the case omits significantly the very paragraphs of his complaint which are essential to a finding that un-

fair labor practices are charged by the complaint. They are also irrelevant to the cause of action the petitioner now claims of breach of the plaintiff's seniority rights under the collective bargaining agreement. These paragraphs omitted in the petitioner's writ are 18, 19, 20, 21 and 26 of the plaintiff's complaint, Record pages 6 and 7. It was on the basis of these allegations that the Connecticut Supreme Court summarized the allegations of the plaintiff's count as follows:

> "The plaintiff alleges in the second count that he was not a member of the union. He states that he was debarred from becoming a member by vote of the union. He charges that the company and the union rearranged seniority rights without his knowledge, permission or consent so that other members of the bargaining unit, 'particularly one or more members of Local 445, PMC (the defendant union), were wrongfully given an earlier seniority than they were entitled to have as against the plaintiff's seniority.' He asserts that the defendants planned, schemed and conspired to oust him from his employment and to preclude him therefrom and that the defendants' actions were an injurious discrimination against him." (Record pages 48 and 49.)

The complaint as originally drawn alleged two causes of action, one charging breach of contract against the company, and the other charging conspiracy by the company and the union. The ruling of the Connecticut Supreme Court was confined to the second count and it is only that count which is therefore before this court for consideration on this petition. (See also discussion under III herein.)

## VI. FEDERAL QUESTIONS

The petitioner's statements as to the federal questions raised leaves the erroneous impression that the Supreme Court passed upon the first count of the complaint, as well as upon the second count. This was not the case. The Connecticut Supreme Court of Errors decided that the National Labor Relations Board had exclusive jurisdiction of the second count of the petitioner's complaint which the court construed to allege charges of unfair labor practices under the National Labor Relations Act and not a cause of action for conspiracy to violate seniority rights.

61 U.S. Statute 146. (See Record pages 50, line 24 ff.)

The court stated:

"He (the plaintiff) claims that the second count of his complaint states a cause of action for conspiracy to deprive him of his seniority rights, and not for an unfair labor practice. The test lies in examining the facts alleged and standing as admitted under the demurrer, in the light of the terms of the Act . . .

". . . These charges of deprivation of seniority rights in favor of union members and of planning, scheming and conspiring to discriminate against him (the plaintiff) cannot by the circumstances under which the actions were alleged to have been perpetrated and by their very nature, as well as by the plaintiff's own characterization of them, be interpreted otherwise than as charges of unfair labor practices under the Act."

(Record pages 48 and 49.)

That court made no determination as to its jurisdiction or that of the National Labor Relations Board over the first count of the petitioner's complaint alleging breach of a collective bargaining contract, saying in so doing, "The plaintiff claims that the first count of the complaint sets forth a cause of action against the company for breach of contract. However, the demurrer interposed by the plaintiff to the special defenses was general in that it claimed that they failed to state a defense sufficient in law against either count. The defenses being good as against the second count, the demurrer fails and was properly overruled." (Record page 50.)

The decision of the Connecticut Supreme Court as it appears from the above quotation was made on an appeal from a decision of the lower court overruling a demurrer filed by the plaintiff to special or affirmative defenses set up by both the company and the union, the respondents herein. (Record page 44.) Under Connecticut practice the overruling of the demurrer permits further pleading on the part of the person filing the demurrer. This the petitioner failed and refused to do and instead permitted judgment to be entered against him for failure to plead further after the overruling of the demurrer. (Record page 44.)

The demurrer interposed by the plaintiff appellant petitioner did not reach the first special defense filed by the union as stated by the Connecticut Supreme Court of Errors in its opinion. (Record page 46.) That defense was in substance that the acts of the parties were in compliance with the collective bargaining contract. (Record pages 24 and 25.) Therefore the determination of the Connecticut Supreme

Court of Errors restricted as it was to a ruling on the nature of the second count of the complaint leaves unanswered and therefore unsettled other issues involved in the first count of the complaint and in the union's first special defense.

The only federal question therefore raised and decided adversely to the petitioner by the Connecticut Supreme Court of Errors was whether the second count of the petitioner's complaint alleged an unfair labor practice cognizable under the Taft-Hartley Act and whether such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board.

## VII. NO SUBSTANTIAL FEDERAL QUESTION INVOLVED REQUIRING GRANT OF CERTIORARI

The petitioner has merely stated that the question involved is a substantial one and that the decision of the state court is not in accordance with the reasoning of this court in analogous cases. He cites no basis for either of these statements.

The denial of certiorari in the case of **Ryan vs. Simons**, 342 U.S. 897 (1951) presents a determination by this court completely in accord with the determination by the Connecticut Supreme Court of Errors in this case. The decision of the Connecticut court is also in accord with the reasoning of this court in the following cases:

**Amalgamated Utility Wkrs. vs. Consolidated Edison Co.**, 309 U.S. 261;

**Bethlehem Steel Co. vs. N. Y. State Labor Relations Board**, 330 U.S. 767;

**International Union of UAW-CIO vs. O'Brien,** 339 U.S. 454;

**Bus Employees vs. Wisconsin Board,** 340 U.S. 383 (1950);

and with the following state and federal decisions:

**Gerry vs. Superior Court,** 32 Cal. (2) 119, 194 Pac. (2) 689;

**Costaro vs. Simon,** 227 App. Div. 1045, reversed, 302 N. Y. 318, 98 N. E. (2) 454;

**Norris Grain Co. vs. Nordaas,** 232 Minn. 91, 46 N. W. (2) 94;

**Direct Transit Lines vs. Teamsters Union,** 29 LLRM 2492 (District Court of Mich. Feb. 5, 1952);

**Pocahantis Corp. vs. Building Trades Council,** 93 Fed. Suppl. 217 (District Court of Maine 1950);

**Reed vs. Fawich Airflex,** 86 Fed. Suppl. 822 (1949);

**NLRB vs. Capitol Serv. Inc.,** USCA, 9th Circuit, June, 1952;

**Amazon Cotton Mills vs. Textile Wkrs. of America,** 167 Fed. (2) 183 (1948).

In view of the decision in the **Ryan vs. Simons** case which involved a suit against the company and the union brought by individual employees of the company to restrain discrimination against those employees and to direct the union to waive a union shop agreement with the employer, it would seem that the petitioner here has the burden of demonstrating special and important reasons for considering the case at hand rather than the **Ryan vs. Simons** case. He has failed either to produce these reasons or to show that

the decision of the Connecticut Supreme Court is probably not in accord with the decisions of this court on the question presented.

We believe there is no substantial federal question presented here any more than there was in the Ryan case and further that the decision of the Connecticut Supreme Court is in accord with the decisions of this court and of the other state and federal courts above cited.

## VIII. ARGUMENT AS TO LEGAL ISSUE

### SUMMARY OF ARGUMENT:

1. The decision of the Connecticut Supreme Court is not the kind of final judgment which this court will review by certiorari.

(A) The Connecticut court determined only one of three issues before it.

(B) The petitioner failed to exercise his right to plead further after the overruling of his demurrer in the lower court.

2. There are no special or important reasons warranting the exercise of this court's discretion.

(A) This decision is of the same nature as Ryan vs. Simons op. cit.

(B) No such reasons are cited by the petitioner.

3. The federal questions decided are in accord with the reasoning of this court in analogous cases.

(A) The Connecticut Supreme Court held,

(1) that the petitioner's second count al-

leged an unfair labor practice and nothing else;

(2) that such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947.

(B) The first determination is in accordance with the interpretation of the same language by

(1) National Labor Relations Board;

(2) The petitioner himself;

(3) The determination of the New York Court of Appeals in Ryan vs. Simons.

(C) The Connecticut court's decision on the second issue is in accord with the following analogous decisions of this court:

**Meyers vs. Bethlehem Shipbuilding Corp.**, 303 U.S. 41;

**Bethlehem Steel Co. vs. N. Y. State Labor Relations Board**, 330 U.S. 767;

**LaCrosse Telephone Corp. vs. Wisconsin Board**, 336 U.S. 18, (1948);

**Plankington Packing House vs. WERB**, 338 U.S. 953;

**Bakery Sales Drivers vs. Wagshal**, 68 Supreme Court 630 (1948).

## ARGUMENT:

1. **The decision of the Connecticut Supreme Court is not the kind of final judgment which this court will review by certiorari.**

### (A) THE CONNECTICUT COURT DETERMINED ONLY ONE OF THREE ISSUES BEFORE IT.

The case came before the Connecticut Supreme Court on a ruling of a trial court overruling the demurrer of the plaintiff to affirmative defenses of the respondent company and union to the two counts of the plaintiff's complaint. (Record pages 39 and 40.) The Connecticut Supreme Court confined its ruling to the sufficiency of some of these defenses to the second count of the plaintiff's complaint. (Record page 50.) It made no ruling as to the sufficiency of these defenses against the first count of the plaintiff's complaint which alleged a breach of contract. (Record page 50.) It also made no ruling as to the sufficiency of the demurrer in failing to reach one of the special defenses of the defendant union which alleged that the conduct of the company and the union had been in accordance with certain paragraphs of the collective bargaining agreement. (Record pages 24 and 46.) Consequently, these two issues remained unsettled by the decision of the Connecticut Supreme Court and its decision therefore is not a final determination of all of the issues in the case.

Consequently, any action by this court in reviewing the matter before it on certiorari would seem to be premature.

> **Montgomery Building & Construction Trades vs. Ledbetter Erection Co.**, 20 Labor Cases 66,407 (1951), cert. granted, U.S. Supreme Ct. June, 1952, State Court decision affirmed by the U.S. Supreme Ct. Dec. 8, 1952.

(B) THE PETITIONER FAILED TO EXERCISE HIS RIGHT TO PLEAD FURTHER AFTER THE OVERRULING OF HIS DEMURRER IN THE LOWER COURT.

The judgment from which an appeal was taken to the Connecticut Supreme Court is a judgment against the plaintiff for failure to plead after the overruling of his demurrer to the defendants' special defenses. Under Connecticut law he had a right to plead over after the overruling of his demurrer.

**Connecticut Practice Book,** Sec. 80 (1934)

This he failed and refused to do and instead elected to have judgment entered against him for failure to plead. (Record page 36.) In other words, he voluntarily avoided a complete determination of the merits of this case by his refusal to plead further. As a result the case as it reaches this court has a number of issues in it which are undecided. At this stage in the proceedings it seems scarcely the type of final determination upon which this court should exercise its discretionary power to review by certiorari.

**2. There are no special or important reasons warranting the exercise of this court's discretion.**

(A) THIS DECISION IS OF THE SAME NATURE AS RYAN VS. SIMONS OP. CIT.

The decision of the Connecticut Supreme Court confined itself to determining that the second count of the complaint alleged charges of unfair labor practices under the Taft-Hartley Act (Labor Management Relations Act, 1947), and that as to the subject matter of that count, exclusive primary jurisdiction was vested in the National Labor Relations

Board by the Labor Management Relations Act of 1947. (Record pages 43 to 50 and particularly pages 44, 48, 49 and 50.)

This decision therefore brings the case squarely within the fact situation covered by **Ryan vs. Simons** op. cit. Since certiorari was denied in **Ryan vs. Simons**, it would seem that one of the questions this court must answer is whether there are important or special reasons for considering this case which either differ from or are greater than the reasons for considering the **Ryan vs. Simons** case on certiorari. We know of none.

### (B) NO SUCH REASONS ARE CITED BY THE PETITIONER.

The petitioner has urged no such special or important reasons for the consideration of this case. Without such reasons there is no basis under Rule 38 for the exercise of this court's discretion.

### 3. The federal questions decided are in accord with the reasoning of this court in analogous cases.

The decision of the Connecticut Supreme Court of Errors as set forth above also raises no substantial federal question which has not heretofore been determined by this court. On the contrary, the decision of the Connecticut Supreme Court seems to be an expression of the well-accepted doctrine that where a party attempts to enforce in state courts rights traceable solely to the National Labor Relations Act (Labor Management Relations Act) and not independently to the common law or general state statutes, the action should be dismissed because

of the exclusive primary jurisdiction of the National Labor Relations Board.

Vol. 3, Labor Law Journal 1 at page 74 citing:

**Alonzo vs. Industrial Container Corp.**, 85 N.Y.S. (2) 835 (1948);

**Pennsylvania Labor Relations Board vs. Frank**, 67 Atl. (2) 78 (1949);

**Costaro vs. Simons**, 302 N. Y. 318 at 321, 98 N. E. (2) 454;

**Meyers vs. Bethlehem Shipbuilding Corp.**, 303 U.S. 41;

**Bethlehem Steel Co. vs. N. Y. State Labor Relations Board**, 330 U.S. 767;

**LaCrosse Telephone Corp. vs. Wisconsin Board**, 336 U.S. 18 (1948);

**Plankington Packing House vs. WERB**, 338 U.S. 953.

(A) THE CONNECTICUT SUPREME COURT HELD,

(1) that the petitioner's second count alleged an unfair labor practice and nothing else;

(2) that such a charge was within the exclusive primary jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947.

Throughout the petition the petitioner repeatedly asserts that the cause of action upon which the Supreme Court of Connecticut passed was one in both contract and tort. Actually, as we have pointed out, the decision of the Connecticut Supreme Court was narrowly confined to determining that the second count of the complaint, the one which the petitioner

claims to allege a tort, alleged a charge of an unfair labor practice under the National Labor Relations Act and could not be otherwise interpreted. The Connecticut Supreme Court did not determine whether the same defenses of exclusive primary jurisdiction of the National Labor Relations Board were good against the first count of the complaint which alleged a breach of contract. (Record page 50.)

**(B) THE FIRST DETERMINATION IS IN ACCORDANCE WITH THE INTERPRETATION OF THE SAME LANGUAGE BY**

**(1) National Labor Relations Board;**

**(2) The petitioner himself;**

**(3) The determination of the New York Court of Appeals in Ryan vs. Simons.**

The petitioner claims that the Connecticut Supreme Court was in error in determining that the second count of his complaint should be interpreted as alleging an unfair labor practice under the Taft-Hartley Act. He cites as his reason for this the omission in his complaint of any statement that the activities of the union and the company complained of were for the purpose of encouraging or discouraging union membership. Conversely he also claims to have set up a cause of action for a conspiracy to violate the petitioner's seniority rights under the contract.

However, both of these matters were considered by the Connecticut Supreme Court and passed upon unequivocally. As to the first, the Supreme Court considered the specific allegations of the complaint

rather carefully and reviewed them in the following language:

> "The plaintiff alleges in the second count that he was not a member of the union. He states that he was debarred from becoming a member by a vote of the union. He charges that the company and the union rearranged seniority rights without his knowledge, permission and consent so that other employees of the bargaining unit, 'particularly one or more members of Local No. 445 P.M.C. (the defendant union), were wrongfully given an earlier seniority than they were entitled to have as against the Plaintiff's seniority.' He asserts that the defendants' actions 'were an unjust discrimination' against him. For the purpose of a decision on the demurrer, he concedes that he filed charges against the defendants with the National Labor Relations Board in which he himself claimed that the actions of the defendants which were the grounds of his complaint 'constitute unfair labor practices affecting commerce within the National Labor Relations Act.' These charges of deprivation of seniority rights in favor of union members and of planning, scheming and conspiring to discriminate against him cannot by the circumstances under which the actions were alleged to have been perpetrated and by their very nature, as well as by the plaintiff's own characterization of them, be interpreted otherwise than as charges of unfair labor practices under the act. To discriminate in hiring, in tenure, or concerning any term or condition of employment by reason of union activities is an unfair labor practice. The cases are legion. See 29

U.S.C.A. par. 158, n. 159, and Sup. 1951. Likewise, discrimination against an employee because he like the plaintiff in this case, is not a member of the union representing the employees of a particular employer, or because he fails or refuses to join one, is an unfair labor practice under the act.

National Labor Relations Board v. American Car & Foundry Co., 161 F. 2d 501, 503;

Virginia Electric & Power Co. v. National Labor Relations Board, 132 F. 2d 390, 396;

National Labor Relations Board v. Yale & Towne Mfg. Co., 114 F. 2d 376, 378;

National Labor Relations Board v. Empire Worsted Mills, Inc., 129 F. 2d 668, 669;

National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206, 218, 60 S. Ct. 493, 84 L. Ed. 704;

2 Teller, Labor Disputes & Collective Bargaining, par. 305, pp. 828, 830, par. 309, p. 838, par. 310, p. 838, par. 324, p. 867;

173 A.L.R. 1424."

It is clear from this quotation of the court's opinion that the omission of the conclusion as to the purpose of these activities alleged in the plaintiff's complaint in no way changed the essential and obvious meaning of the allegations from that determined by the Connecticut Supreme Court of Errors. As a matter of fact under Connecticut practice complaints are to state facts and not conclusions.

**Connecticut General Statutes,** Revision of 1949, Section 7820.

Consequently the very statement the petitioner believes essential to charge an unfair labor practice could not have been included in the pleadings under Connecticut law.

As to the second contention of the petitioner, the Connecticut Supreme Court was equally clear-cut in its denial of this claim. The court states, "He claims that the second count of his complaint states a cause of action for conspiracy to deprive him of his seniority rights and not for an unfair labor practice. The test lies in examining the facts alleged and standing as admitted under the demurrer in the light of the terms of the Act." (At page 48.) Then follows a quotation of the pertinent provisions of the Labor Management Relations Act and the quotation set forth above ending in the statement that "These charges . . . cannot . . . by their very nature as well as by the plaintiff's own characterization of them be interpreted otherwise than as charges of unfair labor practices under the Act." (Emphasis ours.) (Record page 49.)

While the determination by the Connecticut Supreme Court that the plaintiff's pleadings alleged unfair labor practices under the Labor Management Relations Act of 1947 may be questioned by this court, its collateral determination that the pleadings could not be interpreted to state a cause of action of conspiracy to deprive him of his seniority rights would seem to be solely a matter of state law and therefore binding on this court.

U.S. vs. Burnison, 339 U.S. 87 (1950);
Memphis-Charleston R.R. vs. Pace, 282 U.S. 241 (1930).

An examination of the first count of the complaint demonstrates how the petitioner might have set up a cause of action in tort and not as an unfair labor practice charge in the second count of the complaint by omitting the very paragraphs he included in the second count and failed to include in the first count as to the denial of union membership, the preferring of union members over him, and the charge that the actions were in violation of the Taft-Hartley Act. (Record pages 6, 7, paragraphs 18, 19, 20, 21, 25, 26.)

The same charges made in the second count of the complaint had also been made to the National Labor Relations Board by the petitioner and characterized by him as "unfair labor practices affecting commerce within the National Labor Relations Act." (Record page 18.) The National Labor Relations Board acting through its regional director considered the charges as charges of unfair labor practices under the National Labor Relations Act as amended, but found that there was not sufficient evidence to warrant further proceeding and therefore refused to issue a complaint. (Record page 20.)

In the case of **Ryan vs. Simons**, 302 N. Y. 742 c.d. 342 U.S. 897 the plaintiff also attempted to set forth a cause of action under state law but the New York Court of Appeals held that the basic question involved was one of discrimination for union activity, that that was an unfair labor practice under the Labor Management Relations Act and therefore within the exclusive primary jurisdiction of the National Labor Relations Board.

In the companion case of **Costaro vs. Simons**, 302

N. Y. 319 (1951) the complaint charged a violation of the plaintiff's seniority rights by both the union and the company and further charged that the union had refused to admit the plaintiff into its membership. The New York Court of Appeals held that such pleading must be read as alleging that the controversy involved an unfair labor practice under the Labor Management Relations Act which required resort in the first instance to the National Labor Relations Board.

In order to reach the conclusion which the petitioner now requests this court to reach that his second count did not set up charges of unfair labor practices, this court would have to ignore the above cited paragraphs of the second count which constitute at least one third of that count. It would have to ignore the fact that both the petitioner and the National Labor Relations Board considered the same charges as charges of unfair labor practices under the Labor Management Relations Act of 1947. (Record pages 20, 21, 22 and 23.) It would require this court to give less weight to the decision of the Connecticut Supreme Court as to the interpretation of Connecticut pleadings than this court has given to the interpretation of the New York Court of Appeals in the case of **Ryan vs. Simons** op. cit.

For these reasons the conclusion reached by the Connecticut Supreme Court seems the only reasonable one under the circumstances.

**(C) THE CONNECTICUT SUPREME COURT'S DECISION ON THE SECOND ISSUE IS IN ACCORD WITH THE ANALOGOUS CASES OF THIS COURT:**

**Meyers vs. Bethlehem Shipbuilding Corp.**, 303 U.S. 41;

**Bethlehem Steel Co. vs. N. Y. State Labor Relations Board**, 330 U.S. 767;

**LaCrosse Telephone Corp. vs. Wisconsin Board**, 336 U.S. 18 (1948);

**Plankington Packing House vs. WERB**, 338 U.S. 953;

**Bakery Sales Drivers vs. Wagshal**, 68 Supreme Ct. 630 (1948).

The question before this court then is whether, assuming the complaint charges unfair labor practices under the Taft-Hartley Act, exclusive primary jurisdiction is vested in the National Labor Relations Board. This is the precise question which was before this court in the petition for certiorari in the case of **Ryan vs. Simons** and in that case certiorari was denied. No reason has been presented in this case why certiorari should be granted in view of its denial in the **Ryan** case.

The decision of the Connecticut Supreme Court that exclusive primary jurisdiction of unfair labor practices is vested in the National Labor Relations Board is in accordance with the decisions of this court above cited and with:

**National Licorice Co. vs. NLRB**, 309 U.S. 350 at page 365;

It is in accord with the following state and federal decisions:

**Gerry vs. Superior Court**, 32 Cal. (2) 119, 194 Pac. (2) 689;

**Alonzo vs. Industrial Container Corp.**, 85 N.Y.S. (2) 835 (1948);

**Pennsylvania Labor Relations Board vs. Frank**, 67 Atl. (2) 78 (1949);

**Costaro vs. Simons**, 302 N. Y. 318 at 321, 98 N. E. (2) 454;

**Norris Grain Co. vs. Nordaas**, 232 Minn. 91, 46 N. W. (2) 94;

**Amazon Cotton Mills vs. Textile Wkrs. of America**, 167 Fed. (2) 183 (1948) 183 at 190.

The authorities cited by the petitioner are not in point. They concern cases under the Railway Labor Act which has a different legislative background, history and purpose:

**Priest vs. Pacific Railroad**, 139 Fed. (2) 813; or they concern cases in which the existence of a cause of action under state law or under common law as well as under the Labor Relations Act had been established; (Cases cited on page 17 of Petitioner's brief; cases cited top of page 15 and also page 16 of Petitioner's brief); or they concern cases involving matters which were not unfair labor practices under the Taft-Hartley Act (cases cited page 15 of Petitioner's brief), or which did not involve any federal question at all (cases cited bottom page 16 of Petitioner's brief); or they involve cases concerning the interpretation of Section 301 of the Labor Management Relations Act of 1947:

**Wilson & Co. vs. United Packing House Wkrs.**, 83 Fed. Suppl. 162;

**Reed vs. Fawich Airflex**, 86 Fed. Suppl. 822;

**UAW vs. Wilson Athletic Goods,** (1950) U.S. District Court Ill. CCH—No. 65,867, page 7,784.

Even writers who urge the extension of state jurisdiction over matters also within the jurisdiction of the National Labor Relations Board seem to be agreed that where the matter is clearly only a violation of the Labor Management Relations Act and does not involve a cause of action under state law, the National Labor Relations Board has exclusive primary jurisdiction.

cf. Labor Law Journal, Vol. 3, No. 1, page 74, where the writer, Professor Sylvestro Petro of New York University says:

> "Of course, if a complaining party attempts to enforce in state courts rights traceable solely to the NLRA—and not independently to the common law or general state statutes—the action should be dismissed: Section 10 (a) and the decisions in Bethlehem, LaCrosse and Plankington would seem to be conclusive on this point . . ."

We submit therefore that on the narrow issue before this court of the exclusive primary jurisdiction of the National Labor Relations Board to remedy unfair labor practices the decision of the Connecticut Supreme Court is in accord with analogous decisions of this court. There is therefore no substantial federal question involving a decision contrary to the analogous decisions of this court.

## IX. CONCLUSION

In the light of the above discussion we submit that certiorari should be denied in this case because none of the usual bases for the exercise of discretion by this court under Rule 38 are present.

Dated at Bridgeport, Connecticut, this 16th day of December, 1952.

The Respondent-Appellee,
Ansonia Brass Workers Union
Local 445, P.M.C., IUMSWA,
C.I.O.,
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